

# JUAN PANIAGUA

VS.

**NATIONAL BEEF PACKING COMPANY, L.P.**

Respondent

AND

# WAUSAU INSURANCE COMPANIES

Insurance Carrier

<sup>1</sup> K.S.A. 44-510e(a).

Respondent also filed on April 9, 1999 a Motion to Compel Claimant's Testimony, which alleged:

1. Respondent has requested of Claimant's counsel that she produce the Claimant for his deposition pursuant to the Application for Review and Modification which has been filed with this Court.
2. Claimant's counsel has refused to produce her client for the purpose of taking his deposition.

On May 12, 1999, claimant, in response, filed a Motion for Attorney's Fees for defending the post-award review and modification proceeding, a Motion for Penalties for respondent's alleged failure to pay compensation due, and a Motion for Interest on Compensation. There was also an Amended Motion for Attorney's Fees filed on May 13, 1999 and a Motion to Dismiss Application for Review and Modification filed on May 17, 1999.

After conducting a hearing on June 17, 1999, the Judge denied the claimant's request to dismiss the Application for Review and Modification and for attorney fees. The Judge granted the respondent's request to compel claimant to appear at a deposition and give testimony.

Claimant contends the Judge exceeded her authority by (1) denying the Motion to Dismiss Application for Review and Modification, (2) ordering claimant to appear at a deposition and give testimony and (3) denying claimant's Motion for Attorney Fees.

The issues before the Board on this appeal are:

1. Did the Judge err by refusing to dismiss respondent's Application for Review and Modification?
2. Did the Judge err by ordering claimant to appear at a deposition and give testimony?
3. Did the Judge err by denying claimant's request for attorney fees?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds:

On January 27, 1998, the Appeals Board issued an Order requiring National Beef Packing Company, L.P., and its insurance carrier to pay Juan Paniagua temporary total and permanent partial disability benefits totaling \$81,730.77. That Order was affirmed on

appeal. Claimant was awarded a 70 percent work disability based, in part, upon his being unemployed and earning no wages, thereby having a 100 percent wage loss. National Beef and its insurance carrier have been unable to locate Juan Paniagua to ascertain whether or not claimant's employment status has changed. The records also indicate that claimant has not contacted respondent or otherwise supplied any information about his employment search efforts or earnings since the date the original award was entered.

National Beef and its insurance carrier are seeking modification of the Order granting claimant benefits on the basis that claimant is now earning wages and, therefore, his wage loss is less than the 100 percent he had at the time of the original award. Conversely, claimant requests immediate payment of the outstanding benefits and asserts that any change in his earnings cannot be proven by compelling his testimony. A claimant's actual earnings become an integral part of the work disability formula as a result of the 1993 amendments to K.S.A. 44-510e. The Kansas Court of Appeals discussed the significance of that change in Gadberry v. R.L. Polk & Co., 25 Kan. App. 2d 800, 975 P.2d 807 (1998).

To arrive at a fair and accurate assessment of the effect of work-related injuries, the Kansas Legislature has, throughout the life of the Workers Compensation Act, considered several compensatory theories. This court reviewed the legislative evolution of the work disability concept in *Lee v. Boeing Co.*, 21 Kan. App. 2d 365, 368-71, 899 P.2d 516 (1995). Although various formulas have been adopted in an effort to ascertain a fair measurement of a worker's disability, prior to 1993, the formulas were primarily based on the concept of compensation for the loss of *abilities*--the ability to earn wages and/or the ability to perform work. For various reasons, measuring disability compensation by the loss of abilities resulted in concerns about increased litigation and higher insurance premiums. Therefore, in 1993, the Kansas Legislature introduced a new factor into the equation--actual wage loss. The new two-part test for finding and measuring work disability includes both a measurement of the loss of ability to *perform work tasks* and *actual loss of wages* resulting from the worker's disability. K.S.A. 44-510e(a) provides, in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."<sup>2</sup>

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<sup>2</sup> 25 Kan. App. 2d at 802-03.

As this is a claim for an August 1995 accident, the permanent partial general disability is determined by averaging the loss of ability to perform former work tasks with the difference in pre- and post-injury wages.<sup>3</sup> Claimant's post-award work history is material in determining whether the permanent partial general disability has diminished. Therefore, the Appeals Board concludes that respondent has a legitimate basis for taking claimant's deposition as a part of the review and modification proceeding. Obtaining an accurate work history, or at least providing the opposing party an opportunity to investigate, requires that the claimant provide this information post-award either voluntarily or by compelling claimant's testimony.

The Workers Compensation Act provides that an award can be reviewed and modified for good cause shown and, if the award is determined to be excessive or inadequate, the administrative law judge may modify the award. The Act's review and modification statute provides:

Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the administrative law judge for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. . . . The administrative law judge shall hear all competent evidence offered and if the administrative law judge finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the functional impairment or work disability of the employee has increased or diminished, the administrative law judge may modify such award, or reinstate a prior award, upon such terms as may be just, be increasing or diminishing the compensation subject to the limitations provided in the workers compensation act.<sup>4</sup>

"It is the function of a court to interpret a statute to give it the effect intended by the legislature."<sup>5</sup> In construing statutes, the legislative intent is determined from considering the entire Act.<sup>6</sup> When the legislature changed the method of measuring work disability to include claimant's actual earnings, it must have intended that there be a procedure to ascertain what those earnings are post award. Employment status, wages and earnings

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<sup>3</sup> K.S.A. 44-510e.

<sup>4</sup> K.S.A. 44-528(a).

<sup>5</sup> In re Application of Zivanovic, 261 Kan. 191, Syl. ¶ 1, 929 P.2d 1377 (1996).

<sup>6</sup> McGranahan v. McGough, 249 Kan. 328, 820 P.2d 403 (1991).

are not static. Change is inevitable. When an award is entered the relevance of that wage information does not end so long as permanent partial disability benefits are being paid or are payable. In addition, the Court has held other factors to be relevant to a determination of disability. Such factors include whether a claimant has refused a reasonable job offer and whether a claimant has made a good faith effort to find work.<sup>7</sup>

The Kansas Supreme Court has stated that an important objective of workers compensation law is avoiding cumbersome procedures and technicalities of pleading so that a correct decision may be reached by the shortest and quickest possible route.<sup>8</sup>

Further, the Division is not bound by technical rules of procedure but should give the parties reasonable opportunity to be heard and to present evidence, insure an expeditious hearing, and act reasonably and without partiality.<sup>9</sup>

The claimant argues that the request for review and modification is insufficient to allege a basis for reviewing the order granting benefits. The Appeals Board disagrees. Kansas Administrative Regulation provides that an "application for review and modification pursuant to K.S.A. 44-528 shall set forth at least one of the reasons contained therein."<sup>10</sup> Respondent's application alleges that there is a good faith basis to believe that claimant's situation has changed, such that there may be grounds to modify the award. The Appeals Board concludes that the request for review and modification filed by National Beef and its insurance carrier satisfies the applicable statute and regulation.

Next, the claimant argues the Judge lacked the authority to compel his attendance at a deposition. The Appeals Board disagrees. The Workers Compensation Act specifically provides that an administrative law judge has the power to compel witnesses to attend hearings. The Act reads:

The director and the board, for the purpose of the workers compensation act, shall have power to administer oaths, certify to official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents, and records to the same extent as is conferred on district courts of this state under the code of civil procedure.<sup>11</sup>

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<sup>7</sup> See, e.g., Foult v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995) and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>8</sup> Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 756 P.2d 438 (1988).

<sup>9</sup> K.S.A. 44-523(a); Pyeatt, *supra*.

<sup>10</sup> K.A.R. 51-19-1(b).

<sup>11</sup> K.S.A. 44-549(b).

Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges.<sup>12</sup>

Based upon this statutory language, the Appeals Board concludes that the Judge did not exceed her jurisdiction or err by ordering claimant to attend a deposition and testify concerning his post award efforts to find employment and his post award earnings, if any. The administrative law judges have the authority to compel the attendance of witnesses, including the parties themselves, to give testimony on matters relevant to that issue. Otherwise, the intent of the review and modification statute would be completely defeated. The claimant's rights are protected as a preliminary showing of good cause is required and there are limits on the frequency of review and modification proceedings.<sup>13</sup>

Finally, claimant argues the Judge erred by denying her request for attorney fees. Claimant argues that an award of attorney's fees is mandatory because the statute uses the language "shall". The Appeals Board disagrees. That mandatory language refers to cases where there is "no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits." The language of K.S.A. 1999 Supp. 44-536(g) goes on to provide that "If the services rendered herein result in a denial of additional compensation, the director **may** authorize a fee to be paid by the respondent." (Emphasis added.) There were no benefits ordered by Judge Fuller's June 23, 1999 Order. Therefore, an award of attorney's fees is not mandatory. Nevertheless, there has been a preliminary showing that facts may exist that would require the initial award to be modified with respect to the nature and extent of claimant's permanent partial disability. Under these circumstances, the Appeals Board concludes the Judge should have taken the request for attorney fees under advisement until the proceedings on the Application for Review and Modification are concluded and a decision rendered. This is preferable to deciding claimant's entitlement to attorney fees for defending the review and modification proceeding piecemeal. Accordingly, that portion of the Judge's order that denies claimant an attorney fee is reversed to preserve the issue until such time as the ALJ makes a final decision on the Application for Review and Modification.

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<sup>12</sup> K.S.A. 44-551(b)(1).

<sup>13</sup> K.A.R. 51-19-1.

**AWARD**

**WHEREFORE**, the Appeals Board affirms the order to compel claimant to appear at a deposition; affirms the denial of the request to dismiss this review and modification proceeding; and remands this claim to the Judge to address the remaining issues.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2000.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Wichita, KS  
D. Shane Bangerter, Dodge City, KS  
Pamela J. Fuller, Administrative Law Judge  
Philip S. Harness, Director